

Fourth Court of Appeals San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00190-CV

John M. **DONOHUE**, Appellant

v.

CITY OF BOERNE CHIEF OF POLICE JAMES KOEHLER, Officer Pablo Morales and Martha L. Donohue,
Appellees

From the County Court at Law, Kendall County, Texas
Trial Court No. 15-003-CCL
Honorable William R. Palmer Jr., Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Marialyn Barnard, Justice

Patricia O. Alvarez, Justice

Irene Rios, Justice

Delivered and Filed: March 8, 2017

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Introduction

John M. Donohue challenges the trial court's judgment granting the pleas to the jurisdiction filed by the City of Boerne's Police Chief James Koehler and Police Officer Pablo Morales. Donohue also challenges the trial court's judgment granting Martha Donohue's plea to the jurisdiction rendered in the same proceeding. We affirm the trial court's judgment granting Chief Koehler and Officer Morales's plea to the jurisdiction and reverse and remand the trial court's judgment granting Martha Donohue's plea to the jurisdiction.

BACKGROUND

Factually, the underlying suit arose from events surrounding Donohue's arrest for public intoxication on August 9, 2013 by Boerne Police Officer Morales. Officer Pablo Morales first encountered Donohue at a Boerne hospital where Donohue had been brought in by Bandera County EMS and was being treated for cuts and bruises to his arms. The hospital staff called Boerne Police Department for assistance because Donohue was being uncooperative in his treatment. After Officer Morales arrived, Donohue refused care at the hospital and requested a ride to a local hotel. Officer Morales provided a courtesy ride to a local hotel, waited until Donohue checked in and then instructed Donohue to stay in his room.

Donohue alleges he needed to find something to eat. The hotel staff would not let him charge food to his room, so he and the hotel staff called 9-1-1. After growing tired of waiting for police to arrive, Donohue contends he started to walk to find some food, at which time Officer Morales arrived and became angry with him for not staying in his room as instructed. Officer Morales then decided to arrest him for 9-1-1 abuse and then changed the charge to public intoxication. Donohue alleges that during the arrest, Officer Morales grabbed his forearms and wrists and while forcefully placing the handcuffs on his wrists, caused his skin to tear and bleed.

Specific to Martha Donohue, Donohue's ex-wife, Donohue asserts Officer Morales was aware of a protective order issued against Donohue which gave the false impression Donohue had "violent tendencies" and which caused Officer Morales to respond as he did. Donohue alleged the information about his violent tendencies was false, and Martha Donohue and Denise Martinez² had conspired to make these false allegations against him in the protective order proceedings.

¹ Only Officer Morales was involved in the arrest. Donohue asserted suit against Chief Koehler "through vicarious liability."

² Martinez previously represented Martha Donohue in divorce and protective order proceedings against Donohue in Bexar County, Texas.

In this underlying action, John M. Donohue filed suit against numerous defendants, all in their individual capacities: Boerne Chief of Police James Koehler³, Boerne Police Officer Pablo Morales, Bandera County Sheriff Sergeant Jose Hernandez, Bandera County Sheriff Deputy Matt Krueger, Bandera County Sheriff Deputy Birdie Tyler, his ex-wife Martha L. Donohue and Denise Martinez. In his petition, Donohue characterized his claims against Chief Koehler and Officer Morales as claims brought under the Texas Penal Code for aggravated assault with malice and gross negligence, unlawful restraint with malice and gross negligence and abuse of office and official oppression. Donohue also asserted claims based on Chief Koehler and Officer Morales's alleged violations of his rights under the Texas Constitution.

On August 28, 2015, and September 15, 2015, Donohue filed supplements to his petition adding Martha Donohue as a defendant. In his action against Martha Donohue, Donohue sought monetary damages "for criminal acts as described and defined under the Penal Code" of aggravated assault, deadly conduct, and criminal conspiracy. Donohue also alleged the civil causes of action of libel, defamation and intentional infliction of emotional distress.

Chief Koehler and Officer Morales both filed a plea to the jurisdiction, moving to dismiss the claims asserted against them on the same two bases: (1) they are entitled to official immunity from suit; and (2) they were acting in the course and scope of their employment, and thus, the claims may only be asserted against the Boerne Police Department pursuant to the Texas Tort Claims Act (TTCA) sections 101.106(e) and 101.106(f). On September 10, 2015, the trial court granted Chief Koehler and Officer Morales's pleas to the jurisdiction, dismissing all of

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³ Although the style of the case that appears upon Donohue's original and amended petitions is not clear as to what capacity he seeks to sue Chief Koehler, in the body of the petition, amended petition and his appellate brief, Donohue states he sued Chief Koehler in his individual capacity. Donohue asserts Chief Koehler is vicariously liable for Officer Morales's actions as his supervisor.

Donohue's claims against these two parties. In the same order, the trial court also severed the claims against Chief Koehler and Officer Morales.

On October 2, 2015, the trial court granted Sergeant Hernandez, Deputy Krueger, Deputy Taylor and Denise Martinez's plea to the jurisdiction and dismissed with prejudice the claims against these defendants. On November 1, 2016, Donohue mailed a notice of appeal of the trial court's granting of Chief Koehler and Officer Morales's plea to the jurisdiction and Sergeant Hernandez, Deputy Krueger and Deputy Taylor's plea to the jurisdiction.

Thereafter, Martha Donohue filed an answer to Donohue's amended petition adding her to the lawsuit, as well as a motion to transfer venue and a plea to the jurisdiction. Martha Donohue's plea to the jurisdiction challenged the trial court's subject matter jurisdiction, asserting: (1) Donohue's suit presented no justiciable issue because her actions in disseminating the protective order information were statutorily required by the Texas Family Code, and (2) Donohue's claims were preempted by section 85.042 of the Texas Family Code, which governs the reporting of protective orders to law enforcement.

On November 20, 2015, the trial court signed another order stating that the pleas to the jurisdiction filed by all of the named defendants were "upheld", and the trial court dismissed the cause "in its entirety".

The appeals from the judgments granting the four pleas to the jurisdiction proceeded separately in two appeals. This appeal pertains only to Donohue's challenge of the trial court's granting of Chief Koehler and Officer Morales's plea to the jurisdiction as well as Donohue's challenge of the trial court's granting of Martha Donohue's plea to the jurisdiction.

Later, on April 18, 2016, Donohue filed a notice of restricted appeal in this appeal naming as appellees Chief Koehler, Officer Morales and Mary Donohue.

ANALYSIS

I. Chief Koehler and Officer Morales's Challenge to this Court's Jurisdiction

In their appellate brief, Chief Koehler and Officer Morales challenge this Court's jurisdiction to determine the substantive merits of this appeal. Beginning with the assertion that this is a restricted appeal, Chief Koehler and Officer Morales contend Donohue fails to satisfy three of the four requisite elements to be entitled to a restricted appeal, and for this reason, this Court lacks jurisdiction.

This Court has already determined that this appeal is a regular, not restricted appeal, and that Donohue's appeal is timely. On May 24, 2016, this Court issued an order stating,

Donohue mailed a notice of appeal on November 1, 2015, identifying Chief Koehler and Officer Morales as appellees and also indicating his desire to appeal the October 2, 2015 dismissal. On December 18, 2015, Donohue mailed a motion expressly requesting that an appeal proceed against City of Boerne Chief of Police James Koehler, Officer Pablo Morales, and Martha L. Donohue. On April 1, 2016, Donohue filed a notice of restricted appeal against these three appellees.

The record has been filed. Having reviewed the clerk's record, we conclude that Donohue's November 1, 2015 and December 18, 2015 filings were timely and sufficient to effect an appeal against these appellees. *See* TEX. R. APP. P. 26.1(a), 26.3; *Verburgt v. Dorner*, 959 S.W.2d 615 (1997). We therefore **order** this appeal to proceed as a timely, regular appeal against James Koehler in his capacity as Chief of Police of the City of Boerne, Officer Pablo Morales, and Martha L. Donohue.

Pursuant to this order, even though Donohue filed a notice of restricted appeal on April 18, 2016, this notice was inconsequential. Donohue's notice of appeal filed on November 5, 2016 was deemed the operative notice of appeal and was deemed timely.

Because this Court ordered this appeal to proceed as a regular appeal, and the appeal was timely, this argument fails and is overruled.

II. Appeal Pertaining to Martha Donohue

Donohue argues the trial court erred by granting Martha Donohue's plea to the jurisdiction.

Martha Donohue does not assert specific appellate arguments, but states generally that the trial

court did not err by dismissing the action against her because the trial court lacked subject matter jurisdiction and because Donohue failed to assert a justiciable cause of action.

Martha Donohue's plea to the jurisdiction was based upon the same arguments and authority of the plea to the jurisdiction filed by Denise Martinez in the same underlying proceedings. In Donohue's separate appeal from the trial court's granting of Martinez's identical plea to the jurisdiction, this Court issued an opinion on December 7, 2016 and concluded the trial court erred by granting Martinez's plea to the jurisdiction, and therefore, reversed and remanded that portion of the appeal for further proceedings. *See Donohue v. Hernandez*, 04-15-00695-CV, 2016 WL 7119049, at *4-5 (Tex. App.—San Antonio Dec. 7, 2016, no. pet. h.).

Although Martha Donohue does not assert specific appellate arguments, her plea to the jurisdiction was identical to Martinez's plea to the jurisdiction at the trial court. Therefore, the trial court's granting of her plea to the jurisdiction must be reversed and remanded for the same reason: Martha Donohue's arguments stated in her plea to the jurisdiction pertain to the merits of Donohue's claims rather than the trial court's subject matter jurisdiction. *See id*.

Accordingly, we conclude the trial court was not deprived of subject matter jurisdiction for the reasons stated in Martha Donohue's plea to the jurisdiction. Therefore, the trial court erred by granting Martha Donohue's plea to the jurisdiction, and it must be reversed and the cause remanded for further proceedings. *See id*.

III. Appeal from Trial Court's Judgment Granting Chief Koehler and Officer Martinez's Plea to the Jurisdiction

ISSUES ON APPEAL

On appeal, Donohue argues the trial court erred by granting Chief Koehler and Officer Morales's plea to the jurisdiction because: (1) the trial court had jurisdiction under the Texas Penal Code; (2) the trial court failed to address his claims that the officers violated his state constitutional

rights; (3) Chief Koehler and Officer Morales failed to prove entitlement to dismissal pursuant to TTCA § 101.106(f) because they did not prove Officer Morales acted within the scope of employment when he committed intentional torts; (4) Chief Koehler and Officer Morales were sued in their individual, not official capacities, and therefore, cannot invoke immunity from suit; (5) Chief Koehler and Officer Morales offered no proof of entitlement to official immunity. Donohue also argues the trial court abused its discretion by: (1) failing to allow Donohue time for meaningful discovery; and (2) refusing to allow Donohue to appear at the hearing by teleconference.

CHALLENGES SPECIFIC TO THE PLEA TO THE JURISDICTION

Standard of Review

A plea to the jurisdiction is a dilatory plea by which a party challenges a court's authority to determine the subject matter of the action. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *Salas v. Wilson Mem'l Hosp. Dist.*, 139 S.W.3d 398, 402 (Tex. App.—San Antonio 2004, no pet.). Whether a court has subject matter jurisdiction is a question of law which we review *de novo. Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

A. Whether the Trial Court Held Jurisdiction Under the Texas Penal Code

Donohue argues his claims should not have been dismissed pursuant to section 101.106(f) of the TTCA because his claims were brought pursuant to the Texas Penal Code. According to Donohue, he has alleged "criminal acts as described in the Penal Code" and violations of his "rights under the Texas Constitution." Donohue argues these are not claims brought under the TTCA or claims which would be precluded by immunity.

This Court has addressed Donohue's argument in two previous opinions issued in appeals filed by him: *Donohue v. Dominguez*, 486 S.W.3d 50 (Tex. App.—San Antonio 2016, pet. denied) and *Donohue v. Bandera County Sheriff's Dep't*, 04-14-00675-CV, 2015 WL 4759931 (Tex.

App.—San Antonio Aug. 12, 2015, no pet.). As in these previous appeals, this argument fails for the same reasons.

First, Donohue has no standing to bring a punitive suit under the Penal Code because "a criminal action is prosecuted in the name of the State of Texas against the accused, and is conducted by some person acting under the authority of the State, in accordance with its laws." *Donohue v. Bandera County Sheriff's Dep't*, 2015 WL 4759931, at *1; Tex. Code Crim. Proc. Ann. § 3.02 (West 2015)). Therefore, the Texas Penal Code does not provide basis for an individual party such as Donohue to file a civil action. *Donohue v. Bandera County Sheriff's Dep't*, 2015 WL 4759931, at *1.

Next, to the extent Donohue intended to assert a civil assault claim, which requires proof of the same elements as those required for criminal assault, this Court addressed this argument in *Donohue v. Dominguez* and concluded "a civil assault claim is still a 'tort'; it is called 'an intentional tort." *Donohue v. Dominguez*, 486 S.W.3d at 54; *see also Johnson v. Davis*, 178 S.W.3d 230, 240 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). The TTCA does not waive governmental immunity for intentional torts. *City of Watauga v. Gordon*, 434 S.W.3d 586, 588–94 (Tex. 2014); *Donohue v. Dominguez*, 486 S.W.3d at 54.

Thus, contrary to Donohue's argument, the civil claims he asserts are "torts." *See Donohue v. Dominguez*, 486 S.W.3d at 54-55 (citing *Franka v. Velasquez*, 332 S.W.3d 367, 375 (Tex. 2011)). As in *Donohue v. Dominguez*, even though the TTCA does not waive immunity for any intentional tort claims brought by Donohue, those claims are still subject to Section 101.106(f) of the Act. *Donohue v. Dominguez*, 486 S.W.3d at 54-55; *see also Franka*, 332 S.W.3d at 380.

Therefore, the trial court did not acquire jurisdiction to adjudicate Donohue's claims against Chief Koehler and Officer Morales under the Texas Penal Code, and Donohue's asserted claims are subject to the TTCA. Donohue's argument to the contrary is overruled.

B. Dismissal pursuant to Texas Tort Claims Act § 101.106(f)

In three separate issues, Donohue contends Chief Koehler and Officer Morales failed to prove entitlement to dismissal pursuant to Section 101.106(f) of the Act because: (1) they were sued in their individual, not official capacities; (2) they did not prove Officer Morales acted within the scope of employment when he committed intentional torts; and (3) they offered no proof of entitlement to official immunity.

Subsection 101.106 of the Act is commonly known as the "election of remedies" provision and provides in pertinent part:

- (b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.
- (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

TEX. CIV. PRAC. & REM. CODE § 101.106(b), (f) (West 2011).

This provision requires a plaintiff to make an initial decision whether to pursue suit against an individual employee or the governmental employer and compels "dismissal of government employees when suit should have been brought against the government." *Texas Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 355 (Tex. 2013) (*TAGO*); *Alexander v. Walker*, 435 S.W.3d 789, 790 (Tex. 2014). Thereby, "[a]pplication of the TTCA's election-of-remedies provision requires a determination as to whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is

vicariously liable." *Alexander*, 435 S.W.3d at 790 (quoting *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 657 (Tex. 2008)).

Thus, when suit is brought against a government employee for conduct within the general scope of his employment, and suit could have been brought under the Act against the government, subsection 101.106(f) provides that "the suit is considered to be against the employee in the employee's official capacity only." *Alexander*, 435 S.W.3d at 791. Such a suit "is *not* a suit against the employee; it is, in all but name only, a suit against the governmental unit" because a suit against an employee in his official capacity "actually seeks to impose liability against the governmental unit rather than on the individual specifically named." *Id.* (quoting *Franka*, 332 S.W.3d 382 n.68).

Thereby, the TTCA's election-of-remedies provision provides the procedural framework for "early determination of who constitutes the proper defendant" by requiring a plaintiff to make an initial determination whether to sue an employee in an individual capacity or the employing governmental unit. *TAGO*, 408 S.W.3d at 355. If suit is brought against the employee/defendant, only, and this party moves for dismissal, the plaintiff must then amend the pleadings within 30 days to include the government employer as the named defendant. Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f). If the plaintiff does not amend the petition, the suit against the individual employee shall be dismissed if the trial court determines the suit is in actuality a suit against the employee in his official capacity. *Id.* A suit is considered to be against the employee in his official capacity if it is based on conduct within the general scope of employment and if it could have been brought under the Act against the governmental unit. *Alexander*, 435 S.W.3d at 791; *TAGO*, 408 S.W.3d at 355-56.

Following this framework, the clerk's record in this case reflects that Donohue originally sued Chief Koehler and Officer Morales in their individual capacities. After Chief Koehler and

Officer Morales filed motions to dismiss pursuant to section 101.106(f), Donohue did not seek to amend his pleading to dismiss the officers and name the Boerne Police Department as the defendant. By doing so, Donohue made his election of remedies to pursue suit against Chief Koehler and Officer Morales, only, in their individual capacities. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f); *Donohue v. Dominguez*, 486 S.W.3d at 56–57.

Upon this election, the trial court was required to make the determination whether Chief Koehler and Officer Morales were entitled to official immunity from suit because they were acting in their official capacities. To make this determination, Section 101.106(f) required the trial court to determine: (1) whether the alleged conduct was within the scope of Officer Morales's employment, and (2) whether the suit could have been brought under the Act against the Boerne Police Department. *See Alexander*, 435 S.W.3d at 792; Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f). If the answer to both prongs is affirmative, the Act mandates that Donohue's suit should have been brought against the Boerne Police Department (or Chief Koehler and Officer Morales in their individual capacities), rather than Chief Koehler and Officer Morales in their individual capacities, and requires that Chief Koehler and Officer Morales be dismissed from suit. *Alexander*, 435 S.W.3d at 791; *TAGO*, 408 S.W.3d at 356-57; Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f).

The TTCA defines "scope of employment" as "the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(5) (West Supp. 2016). "An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." *Alexander*, 435 S.W.3d at 792 (citations omitted).

Similar to *Alexander* and *Donohue v. Dominguez*, Donohue's allegations stem from Officer Morales's alleged improper conduct in the course of arresting Donohue. Based upon these allegations, we must conclude Donohue's suit was based on conduct within the general scope of Officer Morales's employment as a police officer. *See Alexander*, 435 S.W.3d at 792 (holding allegations stemming from officers' allegedly improper conduct during the plaintiff's arrest were within the general scope of the officers' employment); *Donohue v. Dominguez*, 486 S.W.3d at 56–57. Donohue did not allege an independent course of conduct by Officer Morales intended to further his own purposes, only, rather than that of the Boerne Police Department.

Given that Officer Morales's conduct was within the scope of his employment, we next consider whether Donohue's claims could have been brought under the Act against the Boerne Police Department. See Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f). A civil claim such as those asserted in this action for unlawful restraint, abuse of office and aggravated assault are claims subject to the TTCA. See Donohue v. Dominguez, 486 S.W.3d at 54. "Because the Tort Claims Act is the only, albeit limited, avenue for common law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be under the Tort Claims Act for purposes of section 101.106." Id. at 55 (quotation omitted). Thus, even though the Act does not waive immunity for the intentional tort claims brought by Donohue, those claims are still subject to section 101.106(f). See id.; see also Franka, 332 S.W.3d at 380. Therefore, as in Donohue v. Dominguez, Donohue's claims against Chief Koehler and Officer Morales could have been brought under the TTCA against the government. See id.

Because Donohue's suit against Chief Koehler and Officer Morales was based on conduct within the general scope of their employment and could have been brought under the Act against the Boerne Police Department, Donohue's suit is considered to be against Chief Koehler and

Officer Morales in their official capacities only. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f); *Alexander*, 453 S.W.3d at 792. Chief Koehler and Officer Morales, individually, were entitled to dismissal pursuant to subsection (f). *See Alexander*, 435 S.W.3d at 790–92; *TAGO*, 408 S.W.3d at 357–58.

Thus, for the reasons stated above, we conclude the trial court did not err by granting Chief Koehler and Officer Morales's plea to jurisdiction and dismissing them from suit. We overrule Donohue's appellate arguments on this basis.

C. Dismissal of Claims of Violations of Rights under the Texas Constitution

Donohue argues the trial court erred by granting Chief Koehler and Officer Morales's pleas to the jurisdiction because his claims for constitutional violations must be considered outside the context of the TTCA.

Although Donohue brought suit seeking "sanctions" for the violation of his constitutional rights, he asserts these allegations within the context of a private action which seeks monetary damages, only. As in *Donohue v. Dominguez*, Donohue's claims of violation of his rights under the Texas Constitution do not exist apart from Section 101.106 of the Act. As analyzed and determined in *Donohue v. Dominguez*, generally, there is no private cause of action against a governmental entity or its officials for money damages relating to alleged violations of Texas constitutional rights. *Donohue v. Dominguez*, 486 S.W.3d at 56 (citations omitted). If Donohue had brought suit against a governmental unit under a statute which contains an independent statutory waiver of immunity, such as the Texas Commission on Human Rights Act ("TCHRA") or the Texas Whistleblower Act, such claims would not be subject to dismissal pursuant to section 101.106. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d at 658; *Donohue v. Dominguez*, 486 S.W.3d at 55–56.

Here, however, Donohue has not brought his claims pursuant to an independent statutory waiver of immunity like the TCHRA or the Texas Whistleblower Act. Donohue alleges violations of article 1, sections 9 (search and seizure), 13 (cruel and unusual punishment), and 19 (life, liberty, due course of law) of the Texas Constitution. None of these provisions imply a private right of action, apart from the Act, for damages or "sanctions" against the governmental unit. *Donohue v. Dominguez*, 486 S.W.3d at 56; *see also City of Webster v. Myers*, 360 S.W.3d 51, 60 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) ("Texas courts have held that a claim seeking damages for alleged constitutional violations is brought under the TTCA for purposes of section 101.106"). Thus, Donohue's claims for violation of his constitutional rights do not exist apart from section 101.106 of the TTCA. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d at 658; *Donohue v. Dominguez*, 486 S.W.3d at 55–56.

For this reason, Donohue's argument is overruled.

TIME FOR MEANINGFUL DISCOVERY

Donohue asserts the trial court erred by not allowing time for discovery on the jurisdictional issue.

"Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d at 554. "When the consideration of a trial court's subject matter jurisdiction requires the examination of evidence [beyond the allegations in the pleadings], the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable." *Miranda*, 133 S.W.3d at 227; *Donohue v. Dominguez*, 486 S.W.3d at 56. Thus, while limited discovery may be appropriate when an evidence-based jurisdiction challenge is asserted, when

jurisdiction can be determined from the face of the pleadings, the trial court does not abuse its discretion by refusing to allow discovery. *Miranda*, 133 S.W.3d at 227-29.

Here, it is apparent from the face of the pleadings that Chief Koehler and Officer Morales are immune from suit and suit against them in their individual capacities should be dismissed pursuant to subsection 101.106(f). Because Donohue has not shown how discovery or evidence could establish that the trial court had jurisdiction, when the pleadings establish otherwise, we cannot conclude that the trial court abused its discretion by refusing to allow discovery.

Accordingly, this appellate argument is overruled.

REFUSAL TO CONSIDER DONOHUE'S PLEADINGS AND EVIDENCE

In his last issue, Donohue, who was incarcerated at the time of the hearings, argues the trial court abused its discretion by granting Chief Koehler and Officer Morales's pleas to the jurisdiction "without regard to [his] pleadings or evidence." While Donohue concedes the trial court was not required to allow him to appear via teleconference, he argues that it does not appear from the record that the trial court considered his pleadings and evidence before granting Chief Koehler and Officer Morales's pleas to the jurisdiction.

As stated previously, this Court conducts *de novo* review of a trial court's determination of subject matter jurisdiction. *Miranda*, 133 S.W.3d at 226; *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d at 554. In this review, this Court must construe the pleadings in favor of the pleader and look to the pleader's intent. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Salas v. Wilson Mem'l Hosp. Dist.*, 139 S.W.3d 398, 402 (Tex. App.—San Antonio 2004, no pet.).

Donohue's argument fails because even if the trial court failed to consider his pleadings and evidence in granting Chief Koehler and Officer Morales's pleas to the jurisdiction, upon *de novo* review, this Court must consider and construe the pleadings and evidence in Donohue's

favor. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446. In reviewing the pleadings and evidence presented, this Court has determined the face of the pleadings reveal the trial court lacked jurisdiction and was correct in dismissing Chief Koehler and Officer Morales.

Accordingly, this appellate argument is overruled.

Having overruled all of Donohue's issues on appeal challenging the trial court's granting of Chief Koehler and Officer Morales's plea to the jurisdiction, we affirm the judgment of the trial court with regard to these parties.

CONCLUSION

For the reasons stated, we affirm the trial court's judgment granting Chief Koehler and Officer Morales's pleas to the jurisdiction and reverse and remand the trial court's judgment granting Martha Donohue's plea to the jurisdiction.

Irene Rios, Justice